Connecticut Committee on Judicial Ethics

Informal Opinion Summaries

2020-01 (February 20, 2020)
Financial Activities; Business Activities
Rules 1.2, 1.3, 3.1, 3.11

Issue: May a Judicial Official create an LLC with a long-time friend for the purpose of developing real estate and selling the properties if the Judicial Official limits his or her involvement to that of an investor?

Facts: A Judicial Official, who previously was in the building trades, has inquired if he or she may form an LLC with a long-time friend who owns some building lots. The friend, who is not an attorney, currently holds a developer's license and owns a couple of undeveloped lots. The desire is to develop one or more of those lots with a spec house (i.e. the property would be sold "as is"). The Judicial Official noted that he or she would never be involved in the development of a "custom contract buyer" property where the buyer and the builder agree in advance on the site, style, price, etc. as there is too much potential for a dispute to develop over whether the property was completed in accordance with the purchase agreement. If the venture is successful, the Judicial Official and the friend may seek to purchase and flip other properties. The Judicial Official and the friend would be responsible for financing the construction of the home. In addition to being a financial backer, the Judicial Official may provide some input on the construction. By way of example, the Judicial Official indicated that the friend might ask the Judicial Official for his or her opinion on lighting in a portion of the house. The Judicial Official would not be an officer, director, manager, general partner or advisor, but rather simply an investor.

Relevant Code of Judicial Conduct Provisions: Rules 1.2 (Promoting Confidence in the Judiciary), 1.3 (Avoiding Abuse of the Prestige of Judicial Office), 3.1 (Extrajudicial Activities in General) and 3.11 (Financial, Business, or Remunerative Activities).

Rule 1.2 of the Code of Judicial Conduct states that a judge "should act at all times in a manner that promotes public confidence in the … impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety. The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge violated this Code or engaged in other conduct that reflects adversely on the judge's honesty, impartiality, temperament, or fitness to serve as a judge."

Rule 1.3 of the Code states that a judge "shall not use or attempt to use the prestige of judicial office to advance the personal or economic interests of the judge or others, or allow others to do so."

Rule 3.1 of the Code concerns extrajudicial activities and sets forth general limitations on such activities. Those limitations include not participating in activities that (1) interfere with the proper performance of judicial duties, (2) lead to frequent disqualification, (3) appear to a reasonable person to undermine the judge's independence, integrity or impartiality, (4) appear to a reasonable person to be coercive or (5) make use of court premises, staff, stationery, or other resources, except for incidental use or for activities that concern the law, the legal system or the administration of justice or unless the additional use is permitted by law.

Rule 3.11 of the Code concerns financial and business activities. It provides as follows:

(a) A judge may hold and manage investments of the judge and members of the judge's family.
(b) A judge shall not serve as an officer, director, manager, general partner or advisor of any business entity except for:
    (1) a business closely held by the judge or members of the judge's family; or
    (2) a business entity primarily engaged in investments of the financial resources of the judge or members of the judge's family.
(c) A judge shall not engage in financial activities permitted under subsections (a) and (b) if they will:
    (1) interfere with the proper performance of judicial duties;
    (2) lead to frequent disqualification of the judge;

(3) involve the judge in frequent transactions or continuing business relationships with lawyers or other persons likely to come before the court on which the judge serves; or
(4) result in violation of other provisions of this Code.

Comment (1) to Rule 3.11 states as follows:

> Judges are generally permitted to engage in financial activities, including managing real estate and other investments for themselves or for members of their families. Participation in these activities, like participation in other extra-judicial activities, is subject to the requirements of this Code. For example, it would be improper for a judge to spend so much time on business activities that it interferes with the performance of judicial duties. See Rule 2.1. Similarly, it would be improper for a judge to use his or her official title or to appear in judicial robes in business advertising, or to conduct his or her business or financial affairs in such a way that disqualification is frequently required. See Rules 1.3 and 2.11.

Discussion: Our current Code of Judicial Conduct took effect on January 1, 2011. A discussion of the differences between the former and current Code notes the following with respect to permitted financial activities.

> Rule 3.11: The new Code sets forth different provisions with respect to financial activities. For example, under the new Code a judge may not serve as an officer, director, manager, general manager or advisor of any business entity except for a business closely held by the judge or members of the judge's family or a business entity primarily engaged in investment of the financial resources of the judge or members of the judge's family.
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> The former Code permitted a judge to engage in any financial or business dealings provided that they did not tend to reflect adversely on the judge's impartiality, interfere with the proper performance of judicial duties, exploit the judge's position or involve the judge in frequent transactions with lawyers or persons likely to come before the court on which the judge serves.

While the Connecticut Code is based upon the 2007 ABA Model Code, it is not identical to it. With respect to Rule 3.11, the ABA Model Code specifically stated that "A judge may, subject to the requirements of this Code, hold and manage investments of the judge and members of the judge's family, including real estate, and engage in other remunerative activity" whereas Connecticut includes real estate as an example in Comment (1). A more significant difference is that the ABA Model Code stated that "A judge shall not serve as an officer, director, manager, general partner, advisor or *employee* of any business entity except that a judge may, subject to the requirements of this Code, manage and participate in: (a) a business closely held by the judge or members of the judge's family, or (b) a business entity primarily engaged in investment of the financial resources of the judge or members of the judge's family." (Emphasis added.) Unlike the ABA Model Code, Rule 3.11 deleted the prohibition on being an *employee* of a business entity unless the entity was a closely held business or a business primarily engaged in investment of financial resources of the judge or members of the judge's family.

The question presented by the current inquiry is whether the Judicial Official can establish an LLC with a long-time friend, who is not an attorney, for purposes of investing in real estate development, where the Judicial Official would not hold any office or position other than as an investor in the business.

While not in the Connecticut Commentary to Rule 3.11, the Commentary to the ABA Model Code states as follows with respect to closely held businesses:

> Subject to the requirements of this Code, a judge may participate in a business that is closely held either by the judge alone, by members of the judge's family, or by the judge and members of the judge's family.
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> Although participation by a judge in a closely-held family business might otherwise be permitted by Section 4D(3), a judge may be prohibited from participation by other provisions of this Code when, for example, the business entity frequently appears before the judge's court or the participation requires significant time away from judicial duties. Similarly, a judge must avoid participating in a closely-held family

> business if the judge's participation would involve the misuse of the prestige of judicial office.

While the foregoing Commentary was not adopted in Connecticut, the ABA discussion of what qualifies as a closely-held business is hereby adopted. In particular, a Judicial Official only can be an officer, director, manager, general partner or advisor of a business entity if the owners of the closely-held business consist of the judge, members of the judge's family or a combination of the two. The foregoing interpretation is consistent with *Oklahoma Judicial Ethics Opinion 2003-4*. In particular, in that opinion, the question was whether a judge could serve on the Board of Directors of a closely held corporation engaged in the nursing home business. Members of six families owned the closely held corporation. The inquiring judge owned a few shares and the judge's family owned 1/6 of the stock. Although the Oklahoma Committee did not provide any discussion, they noted "It appears that Canon 4D(3)(a) refers strictly to a totally owned family corporation and not to a small closely held corporation in which the judge's family owns a minority interest." (Canon 4D(3)(a) stated "A judge should not serve as an officer, director, manager, general partner, advisor or employee of any business entity except that a judge may, subject to the requirements of this Code, manage and participate in: (a) a business closely held by the judge or members of the judge's family.") According to Cynthia Gray, Director of the Center for Judicial Ethics at the National Center for State Courts, the foregoing Oklahoma Advisory Opinion is the only opinion discussing what constitutes a closely held business and in particular if such a business only can be owned by a judicial official or his or her relatives or if there can be nonrelatives who are part owners of a closely held business. Ms. Gray was unable to find any opinions that discussed what constitutes an entity primarily engaged in the investment of the financial resources of a judge nor could she opine whether a partnership where the Judicial Official invested funds and the partner developed real estate was one "primarily engaged in the investment of the financial resources of the judge."

In her article entitled "Real Estate Investments by Judges", which is based upon the 1990 ABA Model Code of Judicial Conduct, Cynthia Gray wrote, in relevant part, the following with respect to managing real estate investments:

> Although Canon 4D(2) allows a judge to manage real estate investments,

commentary to that provision indicates that it is limited to 'investments owned solely by the judge, investments owned solely by members of the judge's family, and investments owned jointly by the judge and members of the judge's family.' Moreover, advisory opinions prohibit a judge from personally and actively managing real estate. For example, the New York committee advised that a judge may continue to own commercial real estate as a tenant-in-common as long as the judge takes no active role in the management or operation of the property. *New York Advisory Opinion 89-108. Accord South Carolina Advisory Opinion 5-1985* (a judge should refrain from all managerial functions within a real estate partnership). That limitation is based on Canon 4D(3), which prohibits a judge from serving 'as an officer, director, manager, general partner, advisor or employee of any business entity.'[1]

It has been suggested that the distinction between managing a real estate investment, permitted by Canon 4D(2), and managing a real estate business, prohibited by Canon 4D(3), is 'that a judge may establish policy and participate in decisions, while actual management is left to others…. *In re Foster,* 318 A.2d 523 (Maryland 1974). Thus the advisory committee for federal judges, although noting that a judge may hold and manage investments, including real estate, advised that a judge should not personally manage or operate any business, including a farm or ranch. *U.S. Advisory Opinion 30* (1974). The committee explained that this limitation 'would not preclude his participation in decisions with respect to the purchase, sale and use of land, the purchase of equipment and supplies, or the sale of farm produce or livestock from a farm or ranch he owns but is operated by a farm manager or hired man.'

What is proposed appears to be a business in which the Judicial Official's sole involvement is limited to being an investor. As noted in Judicial Conduct and Ethics (4th Ed.), by James Alfini, Steven Lubet, Jeffrey Shaman and Charles Geyh, §§ 7.01B, 7.07A "the 1972 Model

[1] The 1990 Model Code, as well as Connecticut's current Code of Judicial Conduct, include an exception that allows a judge to serve in such capacities for a business closely held by the judge or members of the judge's family, or a business primarily engaged in the investment of the financial resources of the judge or members of the judge's family.

Code [which was the predecessor to the 1990 and 2007 ABA Model Codes] included an absolute prohibition against judges serving as officers, directors, managers, advisors, or employees of any business. In the words of the reporter to the committee that drafted the 1972 Code, 'To sum it up succinctly, a judge should not engage in business.' These provisions were intended to abolish the permissive approach of the old Canons, and to place rather severe restrictions on a judge's business potentialities. … The 1990 Model Code added two provisos that softened the 'no business' rule. Specifically, a judge may manage or participate in a business closely held by the judge or members of the judge's family, or a business entity primarily engaged in investment of the financial resources of the judge or members of the judge's family. The second proviso adds clarity, explaining that the management of personal investments is never prohibited, even if accomplished through a corporate or partnership structure." The authors note that the Code appears to strike a balance between passive and active involvement, with the difficult issue being when does the permitted management of investments cross the line and become the forbidden involvement in a business. They go on to note that in most cases where judges have been disciplined for violating the per se rule against business involvement, the specific conduct also violated one of the substantive proscriptions found elsewhere in the Code. Examples of this include, but are not limited to, the use of chambers as a business office, use of one's judicial position to gain a business advantage and interfering with the performance of judicial duties due to the time involved in the business.

Recommendation: Based on the information provided, including but not limited to the fact that the Judicial Official will limit his or her role to an investor and will not serve as an officer, director, manager, general partner or advisor to the business, the Committee determined that the Judicial Official may invest in the business since that is comparable to the Judicial Official purchasing shares of stock in any other business; however, the Judicial Official should not provide any advice with respect to the business so as to avoid his or her involvement rising to the level of an "advisor".

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